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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1537

GLEN KING,
Petitioner

VERSUS

SHELBY RURAL ELECTRIC
COOPERATIVE CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

R. J. TURLEY
TURLEY, SAVAGE & MOORE
207 First Federal Building
Lexington, Kentucky 40507

and

WILHOIT & WILHOIT
P. O. Box 35
Grayson, Kentucky 41143

Attorneys for Petitioner

PROFESSIONAL PRINTING CO., 1113 Commercial Dr., Lexington, Ky. 40505 - 252-9802

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IN THE

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OCTOBER TERM, 1973

No. _____

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Petitioner

VERSUS

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

TO THE HONORABLE: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue from this Court to review the judgment of the Court of Appeals of Kentucky in the above-entitled cause.

Citation to Opinion Below

The opinion of the Court of Appeals of Kentucky, printed in Appendix A hereto, is reported in 502 S.W. 2d 659.

Jurisdiction

This Petition for a Writ of Certiorari seeks review by this Court of the judgment of the Court of Appeals of Kentucky dated November 9, 1973, affirming the judgment of the Shelby Circuit Court on an appeal therefrom; which judgment of the Court of Appeals of Kentucky was entered on January 18, 1974, after denial of a Petition for Rehearing by Order entered on January 18, 1974.

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1257(3) upon the following grounds:

1. The validity of the Kentucky Workmen's Compensation Act, as applied by the Court of Appeals of Kentucky to shield one who has no obligations thereunder from common law tort liability to an injured workman employed and insured by another, is drawn into question as thereby being repugnant to the Fourteenth Amendment of the United States Constitution.

2. The privilege of a citizen of the United States to recover damages for personal injuries negligently inflicted by another — i.e., his immunity from injury without recompense — as guaranteed by the Fourteenth Amendment to the United States Constitution, is abridged by construction of the Kentucky Workmen's Compensation Act so as to insulate from tort liability one who has no obligation to provide workmen's com-

pensation benefits or insurance coverage to the injured workman.

3. The equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution, is denied a citizen by construction of the Kentucky Workmen's Compensation Act in such manner as to deny an employee of an independent contractor the right to recover damages for personal injuries against one who contracts with his employer.

These are federal questions of substance which were decided in this case by the Kentucky Court of Appeals but which have not been heretofore determined by this Court; and the Kentucky Court of Appeals has decided such questions in a way probably not in accord with applicable or analogous decisions of this Court.

Question Presented for Review

The question presented for review is whether the Fourteenth Amendment to the United States Constitution secures to an injured employee of an independent contractor the right to recover damages from the contractor's employer, in spite of the fact that such employee is covered by workmen's compensation insurance carried by the contractor.

The Constitutional Provisions and Statutes Involved

The Constitutional provisions involved in this case are:

United States Constitution
Fourteenth Amendment

Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Constitution

Section 14. "All courts shall be open and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

Kentucky Constitution

Section 26. "To guard against transgresion of the high powers which we have delegated, we declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution shall be void."

Kentucky Constitution

Section 54. "The general assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."

The statute involved in this case is:

Kentucky Revised Statutes

§342.055[1]. "Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages, the injured employee may either claim compensation or proceed at law by civil action against such other person to recover damages, or proceed both against the employer for compensation and such other person to recover damages, but he shall not collect from both. If the injured employee elects to proceed at law by civil action against such other person to recover damages, he shall give due and timely notice to the employer of the filing of such action. If compensation is awarded under this chapter, either the employer or his insurance carrier, having paid the compensation or having become liable therefor, may recover in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists, not to exceed the indemnity paid and payable to the injured employee."

1. In effect at the time of Petitioner's injury.

Statement of the Case

Shelby Rural Electric Cooperative Corporation (hereinafter called "Shelby") owns, operates and maintains a transmission system through which high voltage electricity is conducted and distributed in Shelby County, Kentucky. As a rural electric cooperative, it is required to adhere to the policies and standards of the Rural Electrification Administration of the federal government.

Electricom, Inc., (hereinafter called "Electricom") is a contractor engaged in the business of constructing utility transmission lines for electric and telephone companies.

With the approval of the REA, Shelby entered into a written contract with Electricom for construction work to be performed by the latter. This contract was drawn on a form furnished by the REA. Shelby and Electricom simply filled in the blanks with appropriate words and figures. They could not alter the terms recited in the form. The provisions of this contract appear to be identical with those of the contract construed by the Eighth Circuit in *Associated Engineers, Inc.*, vs. *Job* (CCA 8, 1966) 370 F. 2nd 633.

One of the projects assigned to Electricom was the conversion of an existing single-phase line to a three-phase 7200 volt line in order to provide service to a new school.

In contravention of the written contract, Shelby required that all work be done on energized lines so as

not to risk customer inconvenience. Furthermore, although the contract reserved to Shelby the right to supervise the work, Shelby exercised no supervision whatever with respect to safety. As its manager put it, ". . . we do not supervise them in any shape or form . . ."

Glen King had worked for Electricom for several years but his experience was limited to telephone line work, which differs from electric line work and is far less hazardous. Nevertheless, he was employed on this electric line conversion job. He was given no training by Electricom, but was simply told that he would learn as "he went along". His having been required to do the work in which he was engaged at the time of the accident, without appropriate training or experience, was negligence on the part of Electricom; as, by its Answer, Shelby admitted. Working with uninsulated high voltage conductors is dangerous; and there is a peculiar unreasonable risk of harm in working with energized high voltage electrical conductors unless some special precautions are taken. The failure of Electricom to take such special precautions was negligence; as, by its Answer, Shelby admitted.

So it happened that on October 26, 1967, Glen King was moving an energized line from one pole to another when he suffered serious electrical burns which necessitated the amputation of his left arm above the elbow and destroyed almost all of the muscle tissue of his right leg below the knee.

King brought this action against Shelby, alleging negligence on the part of Shelby itself and liability of Shelby for negligence on the part of Electricom in failing to perform non-delegable duties. Shelby answered, admitting that Electricom was indeed negligent as to two counts of the Complaint. It went on to set up defenses of general denial, sole negligence on the part of Electricom, and contributory negligence on the part of King. After discovery proceedings had been substantially completed, Shelby moved for a summary judgment. The motion was granted by the trial court without opinion or other recital of the basis of its decision.

King appealed to the Court of Appeals of Kentucky, presenting the question of whether Shelby was liable for the admittedly negligent conduct of Electricom and also for its own negligence in failing to perform duties required of it both under the common law and by its contract with Electricom. In its brief at that level Shelby argued that it could not be liable to King because he was covered under the Kentucky Workmen's Compensation Act as an employee of Electricom and, therefore, could not maintain an action against Electricom's employer. On oral argument in the Court of Appeals of Kentucky, counsel for King argued that Section 54 of the Constitution of Kentucky proscribes the extension of the "exclusive remedy" provision of the Workmen's Compensation Act to insulate from liability one who neither provides the workmen's compensation insurance n r is legally liable to do so. The Court of Appeals of Kentucky did not

so much as mention the constitutional provision in its Opinion, but held that the Workmen's Compensation Act shields Shelby from any claim by King against it.

On Petition for Researing before the Court of Appeals of Kentucky, King argued that the conclusion expressed in that Court's decision conflicts with not only Sections 14 and 54 of the Kentucky Constitution but also with the Fourteenth Amendment to the Federal Constitution. His Petition for Rehearing was overruled without comment.

Argument

Sections 14 and 54 of the Kentucky Constitution preserve to all persons injured in Kentucky the right to recover damages from those who cause the harm.

It was because of Section 54 of the Kentucky Constitution that the first workmen's compensation act adopted in Kentucky was invalidated. See *Kentucky Utilities Company* vs. *Jackson County Rural Electric Cooperative Corporation,* Ky., 438 S.W. 2d 788, 790, citing *Kentucky State Journal Company* vs. *Workmen's Compensation Board,* 161 Ky. 562, 170 S.W. 437.

Shortly thereafter, upon the premise that it applied only if the employee freely and voluntarily elected to trade his constitutional right of action against his employer for the surer benefits of the act, a second workmen's compensation act was held to be constitutional in *Greene* vs. *Caldwell,* 170 Ky. 571, 186 S.W. 648. Speaking of the Greene case in *Kentucky Hotel* vs. *Cinotti,* 298 Ky.

88, 182 S.W. 2d 27, the Court of Appeals of Kentucky said:

> ". . . we held the present Workmen's Compensation Act to be constitutional because an employee may by contract *elect* to waive the limitations upon recovery for injury." (Emphasis supplied)

This Court has recognized that the Kentucky Workmen's Compensation law is elective. In *Hawkins* vs. *Bleakley,* 243 U.S. 210, 212, speaking of the Iowa Workmen's Compensation Act, it was written:

> "As to private employers, it is an *elective* workmen's compensation law, having the same general features found in the recent legislation of many of the States, sustained by their courts. See . . . Greene vs. Caldwell, 170 Ky. 571 . . ." (Emphasis supplied)

And again in *Middleton* vs. *Texas Power and Light Company,* 249 U.S. 152, 160, this Court said:

> "In recent years many of the States have passed *elective* workmen's compensation laws not differing essentially from the one here in question, and they have been sustained by well-considered opinions of the state courts of last resort against attacks based upon all kinds of constitutional objections, including alleged denial of the equal protection of the laws; usually, however, from the standpoint of the employer . . Greene vs. Caldwell, 170 Ky. 571 . . ." (Emphasis supplied)

The Kentucky Workmen's Compensation Act has never required an employee to waive any constitutional

rights of action against any person other than his employer. On the contrary, his rights of action against others were the subject matter of KRS 342.055, which was in effect at all times material hereto. There is nothing in this case to suggest that Glen King freely and voluntarily waived his constitutionally guaranteed rights against those with whom Electricom contracted. To take away his rights, which persons other than Electricom's employees still enjoy, is to deny this Petitioner the equal protection of the laws.

Admittedly the Court of Appeals of Kentucky phrased its holding in terms of refusing to extend the nondelegable duties of one engaged in inherently dangerous work to the employees of its independent contractors; but, based as it was upon the grounds that such employees are covered by workmen's compensation insurance, the nature and effect of the decision is to extend the sanctuary of the Kentucky Workmen's Compensation Act to one who has no contract of any kind with the employee.

Furthermore, the employer of an independent contractor is in no way obligated by the Kentucky Workmen's Compensation Act to the employees of the independent contractor. It was said in *Vires* vs. *Dawkins Log & Mill Co.*, 240 Ky. 550, 42 S.W. 2d 721, 722, that:

> "It is settled that the principal is not liable under the Workmen's Compensation Law for compensation to the servants of an independent contractor."

See also *Buckhorn Coal & Lumber Company* vs. *Georgia Casualty Company*, 222 Ky. 683, 2 S.W. 2d 383. The

Kentucky court's rationale — that Shelby should have the employer's protection afforded by the Workmen's Compensation Act because "ultimately Shelby paid the premiums" for King's workmen's compensation insurance — is illusory. One could as well say that Shelby's customers ultimately "paid the premiums"; yet who would say that, if a drunk Shelby customer ran off the road and into the utility pole upon which Glen King was working, the customer would be insulated by the Workmen's Compensation Act from tort liability for injuries to King resulting from his negligence.

In *Mountain Timber Company* vs. *State of Washington*, 243 U.S. 219, 234, this Court said:

> ". . . it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the *quid pro quo* for the burdens imposed upon him. . ."

In the same case, at page 237, the Court said:

> "The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect."

The practical operation and effect of this decision of the Kentucky Court of Appeals is that Shelby gets the *quo* without parting with any *quid*, and this without any election on King's part that such be done. It is an abridgement of King's privileges and immunities.

While on the Eighth Circuit Court of Appeals, Mr. Justice Blackmun wrote the opinion in *Associated Engi-*

neers, Inc., vs. *Job* (CCA 8, 1966) 370 F. 2d 633. It was there held that under a contract between the RECC and an independent contractor, which in all particulars seems to be identical to the contract between Shelby and Electricom, the contractor's employee had a right of action against the RECC even though he was covered by workmen's compensation insurance carried by the contractor. The *Job* case is virtually identical to the case at bar in its legal principles and implications, albeit the result was contrariwise.

The rationale upon which the Petitioner rests his case here is analagous to that of this Court in *Seas Shipping Co., Inc.*, vs. *Sieracki*, 328 U.S. 85, in which a shipowner was held liable to an employee of its independent contractor even though the employee had rights of compensation under the Longshoremen's and Harbor Workers Compensation Act.

Conclusion

For the reasons set out above, the Petitioner respectfully submits that a Writ of Certiorari should issue to the Court of Appeals of Kentucky and that this case should be heard and decided by the Supreme Court of the United States.

Respectfully submitted,

R. J. TURLEY
TURLEY, SAVAGE & MOORE
207 First Federal Building
Lexington, Kentucky 40507

and

WILHOIT & WILHOIT
P. O. Box 35
Grayson, Kentucky 41143

RENDERED: NOVEMBER 9, 1973

COURT OF APPEALS OF KENTUCKY

FILE NO. W-12-71

GLEN KING ..... APPELLANT

V.

SHELBY RURAL ELECTRIC COOPERATIVE CORPORATION ... APPELLEE

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE GEORGE F. WILLIAMSON, JUDGE
CIVIL ACTION NO. 2161

OPINION OF THE COURT BY COMMISSIONER VANCE

AFFIRMING

This is an appeal from a summary judgment dismissing appellant's claim. It involves the tort liability of Shelby Rural Electric Cooperation, hereinafter referred to as Shelby, to an employee of its independent contractor, Electricom, Inc.

Shelby owns and operates an electric transmission system. In the operation of its business it became necessary for it to convert a single-phase transmission line to a three-phase line. As this was a major undertaking, Shelby employed Electricom, an independent

contractor, rather than use its own employees to do the work.

Electricom was an experienced contractor in the construction of electric and telephone utility lines and Shelby had previously utilized its sevices. No suggestion is made that Shelby was negligent by reason of its selection of Electricom as the independent contractor to do the work.

Appellant, an employee of Electricom, was severely burned while working on an energized line.[1] He instituted this action seeking recovery against Shelby on three grounds:

1. Shelby was liable for the negligence of its independent contractor;
2. Shelby was liable because of its own negligence resulting in in jury to apellant;
3. Shelby violated certain contractual duties owed to appellant.

Shelby admitted that Electricom was negligent because of its failure to observe certain safety precautions and because of its failure to furnish appellant adequate training and suitable safety equipment. Shelby contended the accident resulted from the sole negligence of Electricom or from the negligence of Electricom and the contributory negligence of the appellant.

---

1. Appellant and Electricom were covered by the provisions of the Workmen's Compensation Act and appellant was paid benefits thereunder.

There is no dispute as to the facts. The real question whether Shelby is shielded from liablity by reason of the employer-independent contractor relationship.

We can begin with the general rule that an employer is not liable for physical harm caused to another by the act or omission of an independent contractor. Simmons v. Clark Construction Company, Ky., 426 S.W. 2d 930 (1968); Jennings v. Vincent's Adm'x, 284 Ky. 614, 145 S.W. 2d 537 (1940); 57 C.J.S., Master and Servant, Sec. 584; Restatement, Torts 2d, Sec. 409.

As noted in the Restatement, the general rule has been a jumping-off place for a number of exceptions, some of which appellant contends are applicable to the facts of this case.

One of the recognized exceptions to the general rule arises from those situations involving work of an inherently dangerous nature. This exception appears to have as its basis the principle that an owner should not be permitted to shield himself from liability for injuries arising out of work that is inherently dangerous by the simple expedient of entrusting that work to an independent contractor. Kentucky Stone Company v. Gaddie, Ky., 396 S.W. 2d 337 (1965).

Appellant contends that work upon high tension transmission lines is inherently dangerous and comes within the exception to the general rule.

The Restatement of the Law, Torts 2d, deals with the questions presented on this appeal in Sections 413,

414, 416, and 427. Those sections read as follows:

§413. Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor.

"One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absnce of such precautions if the employer

(a) fails to provide in the contract that the contractor shall take such precautions, or

(b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions."

§414. Negligence in Exercising Control Retained by Employer.

"One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

§416. Work Dangerous in Absence of Special Precautions.

"One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless

special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise."

§427. Negligence as to Danger Inherent in the Work.

"One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger."

Although the decisions of this court appear to have recognized the liability of the employer of an independent contractor to third persons injured by the negligence of the contractor in the performance of work of an inherently dangerous nature, it has never been determined whether the liability in such cases extends to the employees of the independent contractor Jennings v. Vincent's Adm'x, supra, and Simmons v. Clark Construction Company, supra, involved claims by the employee of an independent contractor against the contractee. In both cases the language seemed to indicate that liability of the contractee extends to the employees of an independent contractor, but neither case actually so held because both cases were dis-

missed upon the basis that the work involved was not of an inherently dangerous nature.

The authorities in other jurisdictions have split upon the question. California, Michigan, and Tennessee have held that an employee of an independent contractor is within the class of persons protected. McDonald v. City of Oakland, 63 Cal. Rptr. 593 (1967); Van Arsdale v. Hollinger. 66 Cal. Rptr. 20, 437 P. 2d 508 (1968); Vannoy v. City of Warren, 15 Mich. App. 158, 166 N.W. 2d 486, and Pierce v. United States. 142 F. Supp. 721 (1955).

Appellant cities Associated Engineers, Inc. v. Job, 370 F. 2d 633 (1966). as authority that South Dakota follows a similar view. In Job the employer admitted negligence and consequently the question of whether the employer's duty to third persons extended to the employees of an independent contractor was not litigated.

Arizona, Florida, New Mexico, Pennsylvania, Texas, Washington and Wisconsin have adopted the contrary view. Welker v. Kennecott Copper Company, Ariz., 403 P. 2d 330 (1965); Florida Power and Light Co. v. Price, 170 So. 2d 293 (1964); Parsons v. Amerada Hess Corporation, 422 F. 2d 610 (1970); Hader v. Coplay Cement Mfg. Co., Pa. 139, 189 A. 2d 271 (1963); Humble Oil & Refining Co. v. Bell, Tex. Civ. App., 180 S.W. 2d 970; Hurst v. Gulf Oil Corporation, 251 F. 2d 836 (1958); Humphreys v. Texas Power and Light Company, 427 S.W. 2d 324 (1968); Epperly v. City of Seattle, 399 P. 2d 591 (1965); and

Potter v. City of Kenosha, 268 Wis. 321, 68 N.W. 2d 4 (1955).

Nothing in the discussions of Sections 413, 414, 416 and 427 of the Restatement, Torts 2d, indicates that an employee of an independent contractor is within the class of "others" protected by those sections. All of the illustrations set out in the Restatement refer to liability of the employer of an independent contractor to third parties other than employees of the independent contractor.

Tentative draft #7 of the Restatement, Torts 2d, contained a special note to Chapter 15 which dealt with liability of employers for the conduct of independent contractors which contained the following language:

> "The other class of plaintiffs not included in this Chapter consists of the employees of the independent contractor. As the common law developed, the defendant who hired the contractor was under no obligation to the servants of the contractor, and it was the contractor who was responsible for their safety. The one exception which developed was that the servants of the contractor doing work upon the defendant's land were treated as invitees of the defendant, to whom he owed a duty of reasonable care to see that the premises were safe. This is still true. See §343. In other respects, however, it is still largely true that the defendant has no responsibility to the contractor's servants. One reason why such responsibility has not developed has been that the workman's recovery is now, with relatively

few exceptions, regulated by workmen's compensation acts, the theory of which is that the insurance out of which the compensation is to be paid is to be carried by the workman's own employer, and of course premiums are to be calculated on that basis. While workmen's compensation acts not infrequently provide for third-party liability, it has not been regarded as necessary to impose such liability upon one who hires the contractor, since it is to be expected that the cost of the workmen's compensation insurance will be included by the contractor in his contract price for the work, and so will in any case ultimately be borne by the defendant who hires him.

"Again, when the Sections in this Chapter speak of liability to 'another' or 'others,' or to 'third persons,' it is to be understood that the employees of the contractor, as well as those of the defendant himself, are not included."

Although this language is not contained in the Restatement as finally adopted, we think it is persuasive.

We align ourselves with those jurisdictions which hold that an employer's responsibility for the negligence of his independent contractor engaged in the performance of work known to be inherently dangerous and the so-called non-delegable duties arising out of such work do not extend to the employees of the independent contractor.

We choose this course for two reasons:

1. The principal reason for the development of the doctrine of liability of an employer of an

independent contractor engaged in inherently dangerous work is to prevent the employer from escaping liability to others or shifting that liability to an independent contractor. In the case of industrial accidents, the vast majority are covered by Workmen's Compensation laws and to that extent the employer of the independent contractor does not escape or shift liability since the employer, in effect, pays the premium for Workmen's Compensation coverage.

2. There does not seem to be any valid reason why an employer of an independent contractor for the performance of specific work should be subjected to a greater liability than he would have if he had utilized his own employees on that particular work.

The contention that Shelby was liable for the negligence of its independent contractor for its failure to exercise safety precautions and the contention that Shelby was negligent itself for its failure to supervise and require the independent contractor to comply with standard safety procedures are grounded upon the same premise, namely, that when the work to be performed is of an inherently dangerous nature, the employer of an independent contractor has a nondelegable duty to see to it that reasonable precaution is taken for the safety of others.

The doctrine of respondeat superior is imposed upon the employer-independent contractor relationship when the independent contractor fails to take reasonable safety precautions and the employer is held

to a nondelegable duty to take the safety precautions himself if his independent contractor does not and failure to do so renders him negligent in his own right.

Although there are strong social reasons why the employer of an independent contractor should be responsible to third parties negligently injured in the performance of work of an inherently dangerous nature, the reasons to extend this protection to the employees of an independent contractor are not so compelling.

Industrial workers are usually protected by Workmen's Compensation laws under which they may recover of their employer for injuries arising out of their work. This recovery may be had although the injury was brought about by the employee's carelessness and absent any negligence on the part of the employer. The price of this social legislation is that when the employee accepts the benefits he releases the employer from tort liability for negligence.

In the case at bar the appellant was protected by and collected Workmen's Compensation from his employer, Electricom. The premiums for the Workmen's Compensation insurance carried by Electricom were undoubtedly a factor in the determination of the contract price between Electricom and Shelby, so that ultimately Shelby paid the premiums.

We can see no reason why appellant, simply because he was an employee of an independent contractor, should be placed in a better position than if he had been an employee of Shelby, in which case

his recovery would be limited without question to the benefits provided by the Workmen's Compensation Act. Conversely, we see no valid reason why Shelby should be subjected to more liability simply because it engaged the services of a qualified independent contractor. Employers frequently farm out work which requires some special skill to an independent contractor skilled in that particular work. The imposition of additional tort liability upon the employer because of the selection of an independent contractor would have a tendency to discourage the practice of selecting skilled independent contractors and cause employers to do the work with their own, sometimes less skilled, work force.

Appellant contends that Shelby retained by contract the right to control the details and manner of performance of the contract, including the right to require safety precautions for the benefit of appellant. The evidence in the case on behalf of Shelby indicated that it did not exercise any control whatever over the work involved and did not consider itself to have the right or the duty to do so.

It is not clear to us that Shelby retained controls beyond those necessary to insure satisfactory progress of the work and an acceptable result. The contract was not introduced into evidence and our only suggestion as to its contents comes from a purported copy of the contract which was attached as an exhibit to a memorandum filed in the trial court by appellant's counsel.

We think the degree of control retained by Shelby has a more important bearing upon whether the relationship between Shelby and Electricom was that of independent contractor-employer or master-servant than it has in determing the extent of Shelby's duty as an employer to the employees of its independent contractor.

One reason for the development of the rule of non-liability of an employer for the negligence of his independent contractor was the unfairness of imposing liability upon an employer who had no means of imposing any control over the work. The right to control is one of the important tests used to distinguish between the master-servant and the employer-independent contractor relationships.

A servant is one who works under his master's direction and control whereas an independent contractor is engaged to do certain work, but to exercise his own discretion as to the mode and manner of doing it. If the one hired to do the work is subject to the control of the employer as to the means, or as to the mode, manner and details of the performance of the work, he is a servant and not an independent contractor; but, if he is subject to the control or direction of the employer only as to the result to be obtained, and is free to follow his own judgment and discretion as to the mode, manner and details of the performance of the work, he is an independent contractor and not a servant. 56 C.J.S., Master and Servant, Sec. 3(3).

Thus, if Shelby reserved sufficient control in its contract to control the mode, manner and method of the performance of the work, Electricom was its employee rather than its independent contractor and as such the employees of Electricom became the employees of Shelby and could not maintain a common law action for injuries arising out of their employment. Mahan v. Litton, 321 S.W. 2d 243 (1959). If Shelby retained only the control necessary to achieve the desired result, then the relationship was that of employee-independent contractor and for the reasons stated elsewhere in this opinion the liability of Shelby for the negligence of the independent contractor does not extend to the employees of the independent contractor.

This case was practiced as an independent contractor case and in at least five instances the main subdivisions in appellant's brief relate to the duties of an employer to the employees of an independent contractor.

We think there was no genuine issue as to a material fact and that Shelby was entitled to judgment as a matter of law.

The judgment is affirmed. All concur.

ATTORNEYS FOR APPELLANT:

R. J. Turley
Turley, Tackett, Savage & Moore
207 First Federal Building
Lexington, Ky. 40507

Messrs, Wilhoit & Wilhoit
P.O. Box 35
Grayson, Ky. 41143

ATTORNEYS FOR APPELLEE:

Messrs. Stoll, Keenon & Park
310 First National Bank Building
Lexington, Ky. 40507

Messrs. Saunders, Mitchell & Mathis
Federal Land Bank Building
Shelbyville, Ky. 40065

PETITION FOR REHEARING DENIED.

MANDATE

THE COMMONWEALTH OF KENTUCKY
THE COURT OF APPEALS
73 Term—November 9, 1973

Glen King
vs.
Shelby Rural Electric Coop. Corp.

W-12-71

Appeal from a judgment of the Shelby Circuit Court
2161

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:

/s/ Frances Jones Mills
FRANCES JONES MILLS, C. C. A.

By _____, *D. C.*

Issued January 18, 1974

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1537

GLEN KING - - - - - - - *Petitioner*

v.

SHELBY RURAL ELECTRIC COOPERATIVE CORPORATION - - - - - - *Respondent*

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

May it please the Court:

STATEMENT OF THE CASE

Nature of the Proceedings

The petitioner herein, Glen King, filed an action for damages against the respondent, Shelby Rural Electric Cooperative Corporation, in the Shelby Circuit Court of the Commonwealth of Kentucky.

His claim was for damages arising out of the alleged tort liability of the respondent.

During the course of the proceedings a summary judgment was rendered in favor of the Shelby Rural Electric Cooperative Corporation; and, thereafter, the

petitioner perfected an appeal to the Court of Appeals of Kentucky.

In due course, and after oral arguments, the Court of Appeals of Kentucky decided the case adversely to the petitioner. A petition for rehearing was filed which was overruled. The mandate was issued forthwith.

The petitioner, Glen King, has now filed a petition for a writ of certiorari to the Court of Appeals of Kentucky alleging this Court has jurisdiction as set forth in 28 U.S.C. § 1257(3).

The case below was styled King v. Shelby Rural Electric Cooperative Corporation and is cited as 502 S. W. 2d 659.

Statement of Facts

The case can be succinctly stated by quoting from the decision of the Kentucky Court of Appeals as follows:

> "This is an appeal from a summary judgment dismissing appellant's claim. It involves the tort liability of Shelby Rural Electric Cooperative Corporation, hereinafter referred to as Shelby, to an employee of its independent contractor, Electricom, Inc.
>
> Shelby owns and operates an electric transmission system. In the operation of its business it became necessary for it to convert a single-phase transmission line to a three-phase line. As this was a major undertaking, Shelby employed Electricom, an independent contractor, rather than use its own employees to do the work.

Electricom was an experienced contractor in the construction of electric and telephone utility lines and Shelby had previously utilized its services. No suggestion is made that Shelby was negligent by reason of its selection of Electricom as the independent contractor to do the work.

Appellant, an employee of Electricom, was severely burned while working on an energized line.[1] He instituted this action seeking recovery against Shelby on three grounds:

1. Shelby was liable for the negligence of its independent contractor;
2. Shelby was liable because of its own negligence resulting in injury to appellant;
3. Shelby violated certain contractual duties owed to appellant.

Shelby admitted that Electricom was negligent because of its failure to observe certain safety precautions and because of its failure to furnish appellant adequate training and suitable safety equipment. Shelby contended the accident resulted from the sole negligence of Electricom or from the negligence of Electricom and the contributory negligence of the appellant.

There is no dispute as to the facts. The real question is whether Shelby is shielded from liability by reason of the employer-independent contractor relationship."

The case was duly submitted to the Kentucky Court of Appeals and the parties thereafter filed briefs.

"[1]Appellant and Electricom were covered by the provisions of the Workmen's Compensation Act and appellant was paid benefits thereunder."

Subsequently, and on motion of the petitioner, Glen King, the Kentucky Court of Appeals heard oral arguments. On November 9, 1973, an opinion was rendered affirming the lower court and dismissing the complaint of Glen King.

On or about the 7th day of December, 1973, the petitioner, Glen King, filed a petition for rehearing before the Kentucky Court of Appeals. In his petition for rehearing before the Kentucky Court, Glen King raised for the first time the question concerning the validity of the Kentucky Workmen's Compensation Act and its possible conflict with the Fourteenth Amendment to the United States Constitution.

ARGUMENT

We feel that the request for a writ of certiorari should be denied for two reasons. First, this Court does not have jurisdiction of this case under 28 U.S.C. § 1257(3) for the reasons that will be hereinafter stated, and, secondly the constitutional question was not timely raised in the court below.

Under 28 U.S.C. § 1257(3) the Supreme Court cannot review a final judgment or decree rendered by the highest court of the Commonwealth of Kentucky unless there was "drawn in question" before that court "the validity of a state statute," i.e., the Kentucky Workmen's Compensation Act, "on the ground of its being repugnant to the Constitution, . . . of the United States."

In order for the Supreme Court to review by certiorari the final judgment of the highest court of a

state it must appear that the state court had first been appraised that a state statute was being attacked as invalid on federal grounds. It must also appear that the state court had the opportunity to authoritatively construe the conflict and rule upon the validity of the state statute under the laws and/or Constitution of the United States. See Wilson v. Cook, 327 U. S. 474, 66 S. Ct. 663.

It must also appear that the decision below turned upon a Constitutional question and that a decision on that question was necessary to the determination of the case. If the judgment of the state court rests upon adequate and independent grounds of state law certiorari should not be granted.

The Supreme Court of the United States reviews judgments, not statements and opinions. It was stated in the case of Black v. Cutter Laboratories, 351 U. S. 292, 76 S. Ct. 824, that the Supreme Court ". . . should not pass on federal questions discussed in the opinion" of a state court "where it appears that the judgment rests on adequate state grounds."

Perhaps the best statement in this area is found in the case of Herb v. Pitcairn, 324 U. S. 117, 65 S. Ct. 459, and we quote as follows:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds . . . citing cases . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of

> our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

These prerequisites do not appear from the petition for the writ of certiorari nor do they appear from the final opinion of the Kentucky Court. The decision, as rendered, did not discuss nor attempt to determine a constitutional question but was simply a decision rendered under the existing Kentucky common law.

The Kentucky Court of Appeals in rendering its decision determined that an employer is not liable for physical harm caused to another by the act or omission of an independent contractor and it also held that it was aligning itself with its sister jurisdictions holding that an employer's responsibility for the negligence of his independent contractor engaged in the performance of work known to be inherently dangerous does not extend to the employees of the independent contractor. The court gave two reasons for its findings which are more fully set forth in the opinion. This is a correct and proper function of an appellate court of a state in order to determine the public policy of that jurisdiction.

The decision does not involve in any way the determination of whether the Fourteenth Amendment to the United States Constitution secures to an injured

employee of an independent contractor the right to recover damages from the contractor's employer, in spite of the fact that such employee is covered by workmen's compensation insurance carried by the contractor as stated in the petition for writ of certiorari.

The petitioner, appellant below, also recognized that this was the basis of his case; and, again, we quote from the opinion of the Kentucky Court of Appeals as follows:

> "This case was practiced as an independent contractor case and in at least five instances the main subdivisions in appellant's brief relate to the duties of an employer to the employees of an independent contractor."

The opinion of the court below is not interpreting a statute which excludes an employee of an independent contractor from recovering from a contractee. It is the interpretation and molding of the old common law principle to which the opinion addresses itself. Prosser on Torts, 3rd Ed., p. 480. This function of the court is well recognized as a necessary one to keep the law current. City of Louisville v. Chapman, Ky., 413 S. W. 2d 74.

There are many relationships, such as the one in question, which for various court-ordained policy reasons, prohibit recovery by a peron who is injured. The most obvious is contributory negligence, but the doctrines of fellow servant, governmental immunity, joint venture, inter-family immunity, and trespasser/landowner are also examples of relationships which prohibit or limit recovery for a personal injury. If the peti-

tioner is correct in this instance then all of these doctrines are violative of the Kentucky and the United States Constitutions.

The opinion of the Kentucky Court of Appeals cites the Workmen's Compensation Statutes as indications and explanations of what the public policy is in Kentucky concerning employees of skilled independent contractors, and those statutes are used to define the common law in this area. Those policy determinations are set forth in the opinion and they are valid and necessary to promote specialists in the industry. The Kentucky Workmen's Compensation Act and its constitutionality was not involved in the correct determination of this case by the Kentucky Court of Appeals.

Secondly, the Supreme Court Rules provide that where the review of the judgment of a state court is sought by a petition for a certiorari the party seeking the writ must specify the stage at which and the manner in which the federal or constitutional questions sought to be reviewed were raised in the court below. We quote Rule 23(f) of the Supreme Court Rules as follows:

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by

> the court; . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

This is a jurisdictional requirement.

Petitioner seeks to set aside this jurisdictional requirement by stating that in his ". . . Petition for Researing[1] before the Court of Appeals of Kentucky, King argued that the conclusion expressed in that Court's decision conflicts with not only Section 14 and 54 of the Kentucky Constitution but also with the Fourteenth Amendment to the Federal Constitution."[2]

The decision in the case was rendered on November 9, 1973. The petition for rehearing was filed on December 7, 1973, and by the petitioner's own admission the Fourteenth Amendment to the United States Constitution was mentioned for the first time.

The petition for rehearing was denied and the mandate of the Kentucky Court of Appeals affirming the order of the trial court dismissing the complaint of Glen King was issued without additional findings or comment on January 18, 1974. See Appendix B of the petition for a writ of certiorari.

We submit that such a question should have been raised before the decision was rendered by the Kentucky Court of Appeals. The raising of such a question on a petition for rehearing before that court is too late.

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[1]Should be "Rehearing."

[2]See Page 9 of petition for writ of certiorari filed herein by Glen King.

In the case of Sayward v. Denny, 158 U. S. 180, 15 S. Ct. 777, this Court held that where the grounds for jurisdiction of the Supreme Court of the United States is alleged to be the denial of a privilege secured by the Constitution of the United States and that if such denial was set up for the first time in a petition for rehearing before the court of last resort in the state wherein the action arose it is too late. To the same effect, see Citizens National Bank of Cincinnati v. Durr, 257 U. S. 99, 42 S. Ct. 15, which also held that where the application to a state supreme court for a rehearing presented for the first time the contention that certain of the Ohio taxation statutes were repugnant to the Fourteenth Amendment of the United States Constitution such contention came too late to raise a question for review by the Supreme Court of the United States in an application for the allowance of a writ of certiorari filed in that court.

In the case of Herndon v. State of Georgia, 295 U. S. 441, 55 S. Ct. 794, the defendant in a criminal action assailed a statute of the State of Georgia as contravening the due process clause of the Fourteenth Amendment in certain designated particulars. The Supreme Court of the United States held that it was without jurisdiction to entertain the appeal because the federal question was not seasonably raised in the court below or passed upon by that court. We quote from that opinion as follows:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused

to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." (Citing cases)

We submit that the constitutional question should have been raised before the Kentucky Court of Appeals handed down its decision in the case. The raising of a constitutional question on a petition for a rehearing in that Court, which was not considered or passed upon by that Court, will not suffice for the reasons hereinabove stated.

CONCLUSION

The opinion of the Kentucky Court of Appeals determined the litigation between the parties on the merits of the case.

There was no United States constitutional question timely presented during the course of the proceedings below. Nor did the state court's decision turn upon any federal constitutional question and this was not necessary because the decision was rendered under applicable Kentucky common law.

The opinion of the Kentucky Court of Appeals is clear and correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

C. W. SWINFORD
1000 First Security Plaza
Lexington, Kentucky 40507

Attorney for Respondent

Of Counsel:

STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507